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No. 94-939

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ENTERPRISE VI, *et al.*,

Petitioners,

v.

BRUCE FERGUSON, *et al.*,

Respondents.

and

ERPENBECK COMMERCIAL ENTERPRISES, INC., *et al.*,

Petitioners,

v.

BRUCE FERGUSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioners possessed a property interest in their proposed zoning concept development plan sufficient to support a Fifth Amendment taking and a Fourteenth Amendment due process claim as a basis for Petitioners' alleged 42 U.S.C. §1983 claim.

II. Whether members of the Boone County Planning and Zoning Board and the Boone County Fiscal Court act in a quasi-judicial manner in conducting a public hearing on a zoning concept development plan and therefore enjoy absolute judicial immunity.

III. Whether the members of the Boone County Planning and Zoning Board and Boone County Fiscal Court in denying the zoning concept development plan are entitled to qualified immunity as a matter of law.

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STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or

> Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured and in an action at law, suit in equity, or other proper proceeding for redress.

Article 15, the pertinent provision of the Boone County Zoning Ordinance, appears in the Appendix.

COUNTERSTATEMENT OF THE CASE

This is an action brought pursuant to 42 U.S.C. §1983 against the individual members of the Boone County Planning Commission and the Boone County Fiscal Court, being Bruce Ferguson, Don Davis, Irene Patrick, Shirley Meihaus, Larry Barnett, Fred Burch, Lawrence Collins, R. N. Greene, Rector Jones, Robert Kirby, Donald McMillan, Barry Neltner, Thurman Owens, Ralph Rush, Floyd Sharp, Carol Smith, and William Viox. (Petitioners' App. 18a). Petitioners appeal the dismissal of the individual Respondents. (Petitioners' App. 5a).

The Petitioners own 264 acres of undeveloped property in Boone County, Kentucky, along State Route 18 near the Florence Mall. (Petitioners' App. 23a). In 1986, the Boone County zoning authorities designated this tract a combination of C-2/PD overlay and I-1. (Petitioners' App. 25a). The C-2 zone permits commercial uses. (Petitioners' App. 26a). The I-1 zone permits industrial uses. (Petitioners' App. 26a). The PD overlay designation to the C-2 zone requires a submission of a concept development plan and approval by the Boone County Planning Commission and the Boone County

Fiscal Court. (Petitioners' App. 28a). In considering the concept plan, the Commission is to evaluate its compatibility with the County Comprehensive Plan (the County's chief planning document), deviations from the underlying zone, the density and effect on surrounding properties and roadways, among other factors. (Petitioners' App. 28a).

In late 1989, Petitioners and others filed an application with the Boone County Planning Commission proposing the construction of a Bigg's hypermarket on 43.45 acres of this property. (Petitioners' App. 30a). Of the 43.45 acres, 34.8 lay in the CC-2/PD overlay zone with the balance in the I-1 zone. (Petitioners' App. 6a). The Bigg's hypermarket would be a permitted use in a straight C-2 zone but not the adjoining I-1 industrial zone. (Petitioners' App. 6a). Petitioners refused to file a zone change application for the acreage zoned I-1.

The proposal proved exceedingly controversial and drew much public comment. (Petitioners' App. 32a). The initial Planning Commission hearing required rescheduling to a large high school auditorium to accommodate the crowd. (Petitioners' App. 32a). The Planning Commission voted to recommend denial of the submitted concept development plan to the Boone County Fiscal Court. (Petitioners' App. 15a).

Since the property lay in unincorporated Boone County, the Fiscal Court is the legislative body with final authority under K.R.S. Chapter 100. (Petitioners' App. 23a-24a). The Fiscal Court eventually approved the recommendation of the Planning Commission and denied the concept development plan in February, 1990. (Petitioners' App. 33a).

Petitioners submitted no further plan to the Commission, but immediately instituted this action in the Boone Circuit Court appealing the decision of the Boone County Fiscal Court. (Petitioners' App. 7a). Some seventeen months later however, in July, 1991, the Petitioners amended their complaint in the Boone Circuit Court to add the individual members of the Boone County Planning Commission and the individual members of the Boone County Fiscal Court as defendants under 42 U.S.C. §1983. (Petitioners' App. 22a-44a).

Prior to filing an answer, these individual Respondents filed a motion to dismiss for failure to state a claim pursuant to Kentucky Civil Rule of Procedure 12.02. (Petitioners' App. 16a). The Boone Circuit Court dismissed them by its Order entered October 28, 1991. (Petitioners' App. 14a). As detailed later in this brief, the Court's Order contained several bases for dismissal but most prominently among them is the Court's holding that the individual Respondents herein were entitled to absolute immunity from the §1983 claim posed by Petitioners. (Petitioners' App. 15a). On December 19, 1991, the Boone Circuit Court overruled Petitioners' motion to vacate its prior judgment. (Petitioners' App. 17a). Petitioners unsuccessfully appealed to the Kentucky Court of Appeals which affirmed the dismissal in an unpublished opinion. (Petitioners' App. 4a). The Kentucky Supreme Court denied discretionary review by Order entered August 24, 1994. (Petitioners' App. 1a).

On December 14, 1994, the Kentucky Supreme Court denied discretionary review of the underlying companion zoning appeal from the Boone Circuit Court's summary judgment in favor of the Boone County Planning Commission and the Boone County Fiscal Court and against the Petitioners. (App., *Infra,* 1a).

REASONS FOR DENYING PETITION

Petitioners have failed to establish a violation of any constitutional right at all. Petitioners have no legitimate claim of entitlement or justifiable expectation in the approval of their concept development plan. State law invests both the Boone County Planning Commission and the Fiscal Court with great discretion in approving, denying or modifying proposed development plans. Thus, Petitioners lack a property interest requisite to an action pursuant to 42 U.S.C. §1983.

If the Court posits a liberty or property interest sufficient to undergird an action based on 42 U.S.C. §1983, the individual members of the Planning Commission and Fiscal Court should be granted absolute immunity since they function in a quasi-judicial role. *Butz v. Economou*, 438 U.S. 478 (1978). Kentucky's Supreme Court has characterized this process as "essentially adjudicatory".

Finally, at a minimum, the individual members of the Boone County Planning Commission and Boone County Fiscal Court are entitled to qualified immunity since Petitioners have failed to plead a violation of a constitutional right that was clearly established at the time of these individual Commissioners' action.

ARGUMENT

I.

WHETHER PETITIONERS POSSESSED A PROPERTY INTEREST IN THEIR PROPOSED ZONING CONCEPT DEVELOPMENT PLAN SUFFICIENT TO SUPPORT A FIFTH AMENDMENT TAKING AND A FOURTEENTH AMENDMENT DUE PROCESS CLAIM AS A BASIS FOR PETITIONERS' ALLEGED 42 U.S.C. §1983 CLAIM.

Petitioners characterize this case as one presenting to the Supreme Court the opportunity to consider whether absolute judicial immunity is available to local planners and zoners. However, Petitioners fail to cross the initial threshold requirement to an action brought under 42 U.S.C. §1983. Petitioners have failed to establish the violation of any constitutional right at all.

In *Siegert v. Gilley,* 500 U.S. 226 (1991), this Court set forth the analytical structure for claims of immunity. The Court noted on page 231 of its opinion that the first inquiry in the examination of such an immunity claim is the allegation of the violation of a clearly established constitutional right. Respondents claim that Petitioners have not only failed to establish a violation of a clearly established constitutional right, but that Petitioners have failed to establish the violation of any constitutional right at all.

Respondents argue that Petitioners have no "legitimate claim of entitlement" or "justifiable expectation" in the approval of their concept development plan, sufficient to raise to a property interest. *Board of Regents v. Roth,* 408 U.S. 564 (1972). The lack of a property interest flows from the broad discretion invested in the Planning Commission and Fiscal Court by law. In order to establish a property interest, Petitioners must demonstrate that the Planning Commission and Fiscal Court lacked

discretion to deny the concept development plan if it met certain minimum mandatory requirements. *Silver v. Franklin Township Board of Zoning Appeals, et al.*, 966 F.2d 1031 (6th Cir. 1992). Furthermore, as discussed below the Planning Commission's denial of the concept development plan does not lack a rational basis. *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227 (9th Cir. 1994).

Section 1504 of the applicable zoning regulations requires review and approval of a concept development plan for development of any property with a PD overlay designation. In 1986, the Boone County Comprehensive Plan identified the area in which the Petitioners' property was located, i.e., the Kentucky 18 corridor, as needing protection from regionally oriented commercial development generating high volumes of traffic. The overlay zone assures that the commercial development will be of a lesser scale than the regional kind and that the commercial development will be coordinated with either existing infrastructure or infrastructure will be provided as part of the new development.

Section 1506 sets forth the standards for review of a concept development plan. The Planning Commission reviews the concept development plan for:

(1) consistency with the intent and purpose of §1500;

(2) whether the proposed development advances the general welfare of the community and neighborhood; and

(3) whether the benefits, combination of various land uses, innovation of physical design, and the inter-relationship with the land uses in the surrounding area justify the deviation from standard district regulations.

Section 1500 sets forth various criteria which include, among others:

(1) a useful pattern of open space;

(2) a development pattern preserving and utilizing natural topography trees and vegetation;

(3) efficient use of land; and

(4) a development pattern in harmony with land use density, transportation facilities, community facilities, and objectives of the comprehensive plan.

Thus both the Boone County Planning Commission and the Fiscal Court are invested with wide discretion in accepting or rejecting or requiring modifications to any proposed concept development plan. Furthermore, the criteria used to judge the plan is rationally related to the planning and zoning purposes of the public police power. Therefore, Petitioners have no entitlement to the approval of any specific concept development plan.

Petitioners thus trip at the threshold of their §1983 claim. Petitioners have simply failed to establish a violation of a constitutional right at all. The Planning Commission acted completely within its discretion in denying the concept development plan. Petitioners made no effort to amend the plan or otherwise satisfy concerns of the Commission. Rather, Petitioners rushed immediately to court in bringing the instant action. For these reasons, the case presents no real opportunity for the Supreme Court to review immunity, whether qualified or absolute. Lacking a constitutional violation, Petitioners' case, on its facts, does not even reach the immunity issue.

II.

WHETHER MEMBERS OF THE BOONE COUNTY PLANNING AND ZONING BOARD AND THE BOONE COUNTY FISCAL COURT ACT IN A QUASI-JUDICIAL MANNER IN CONDUCTING A PUBLIC HEARING ON A ZONING CONCEPT DEVELOPMENT PLAN AND, THEREFORE, ENJOY ABSOLUTE JUDICIAL IMMUNITY.

"It is well settled that federal, not state law, determines the adequacy of defenses asserted in civil rights actions brought pursuant to 42 U.S.C. §1983." *Jodeco, Inc. v. Hahn,* 674 F.Supp. 488, 497 (D.N.J. 1987). However, a court may consider relevant state law in determining which federal immunity standard appropriately applies to the facts of the case. *Qualls v. Parrish,* 534 F.2d 690, 694 (6th Cir. 1976). The United States Supreme Court has extended the absolute immunity available to judges to all persons who function as a judge, explicitly including administrative hearing officers. *Butz v. Economou,* 438 U.S. 478 (1978). Since the *Butz* decision, federal courts have extended absolute immunity to a variety of persons who function in a judicial or quasi-judicial nature. *Bass v. Attardi,* 868 F.2d 45 (3rd Cir. 1989) [absolute immunity granted to members of a city planning board for their allegedly unconstitutional refusal to grant site plan approval and a parking variance for a methadone maintenance treatment center] ; *Horwitz v. State Board of Medical Examiners,* 822 F.2d 1508 (10th Cir. 1987) [members of the Colorado State Board of Medical Examiners in their individual capacities were granted absolute immunity when sued by a plaintiff podiatrist for suspending his license in alleged violation of due process] ; *Cloverdale v. Department of Social and Health Services,* 834 F.2d 758 (9th Cir. 1987) [absolute immunity granted to state employed child protective services workers for her actions in seeking,

obtaining and executing an ex parte court order directing that plaintiff's newborn daughter be seized from the hospital and placed in temporary shelter care]; *Vacas v. Rodriguez,* 728 F.2d 1293 (10th Cir. 1984) [members of state board of healing arts accused of violating procedural due process]; *Kutilek v. Gannon,* 766 F.Supp. 967 (D.Kan. 1991) [absolute immunity granted to executive director of board and physician consultants to state board of healing arts].

In the zoning context, absolute immunity is the rule rather than the exception. Numerous cases have held members of various planning and zoning boards absolutely immune as either protected by absolute legislative immunity or absolutely judicial or quasi-judicial immunity. *Jodeco, Inc. v. Hahn,* 674 F.Supp. 488 (D.N.J. 1987); *Baytree of Inverrary Realty, Inc. v. City of Lauderhill,* 873 F.2d 1407 (11th Cir. 1989); *Bass v. Attardi,* 868 F.2d 45 (3rd Cir. 1989); *Dunmore v. City of Natchez,* 703 F.Supp. 31 (S.D. Miss. 1988); *Hope Baptist Church v. City of Bellefontaine Neighbors,* 655 F.Supp. 1216 (E.D.Mo. 1987); *Carroll v. City of Prattville,* 653 F.Supp. 933 (M.D.Ala. 1987).

The *Jodeco* case was specifically relied upon by the Boone Circuit Court in its order of dismissal and offers the best discussion and review of this area of the law. The Court first noted that zoning officials sometimes act in a legislative function and, as such, are entitled to absolute immunity under *Lake County Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391 (1979). At times, zoning officials act as adjudicators. The Court analyzed the reasons underlying the grant of immunity to judges, concluding that the immunity:

> benefits the public interest by insuring judicial independence and by preventing judges from being subjected to vexatious actions. If a civil action could be maintained against a judge by virtue of an allegation of malice or even negligence, judges would lose that independence without which no judiciary can either be respectful or useful.

Jodeco, Inc. v. Hahn, 674 F.Supp. 488, 496-497 (D.N.J. 1987) (citations omitted.)

The Court next found this same rationale equally applicable to the New Jersey Planning and Zoning Board in question. The New Jersey Planning and Zoning Board was required to hold a hearing on each application for a development adoption or revision or amendments of its master plan. The hearing was conducted with due process safeguards, including the fact that the agency was required to act upon written findings of fact and conclusions based thereon, which were subject to reivew on an arbitrary and capricious standard. The court concluded that the planning and zoning boards "shared enough of the characteristics of the judicial process to warrant an absolute privilege, their respective members operated in a quasi-judicial capacity and were therefore properly immune from suit." *Id.* at 498. In quoting *Centennial Land and Development Co. v. Township of Medford,* 165 N.J. Superior 220, 397 A.2d 1136 (1979), the court noted:

> Many of these local zoning official serve voluntarily, often at night, without remunerations; have to expend extensive time and effort in preparing and participating in the land use development of the community. Were this court to hold that these board members were without any immunity, the inevitable consequence would be to deter intelligent civic-minded persons from serving on munic-

> ipal land use boards. The fear of incurring great expense and attorney's fees, losing time from employment and suffering the anxiety and distress resulting therefrom, could have no other effect.

Jodeco, Inc., 674 F.Supp. at 498.

An examination of Kentucky law indicates that members of the Planning and Zoning Commission and Fiscal Court in ruling on zoning matters such as involved in this case act in an adjudicatory fashion. Therefore, the same quasi-judicial absolute immunity protects their actions from vexatious lawsuits such as this. Both by case law and statute, the Planning Commission and Fiscal Court are required to hold a public hearing on zone change applications. K.R.S. 100.213; *City of Beechwood Village v. Council, etc.*, 574 S.W.2d 322 (Ky. App. 1978). At the hearing, applicants are entitled to present evidence and cross examine witnesses. *Fiscal Court of Jefferson Cty. v. Ogden*, 556 S.W.2d 899 (Ky. App. 1977). Furthermore, the public entity must act on the basis of a record, *Resource Development Corp. v. Campbell County Fiscal Court*, 543 S.W.2d 225 (Ky. 1976), and adopt written findings of fact and conclusions. *McKinstry v. Wells*, 548 S.W.2d 169 (Ky. 1977). The findings and conclusions are subject to review on an arbitrary and capricious standard. *City of Louisville v. McDonald*, 470 S.W.2d 173 (Ky. 1971). These public officials obviously function in an adjudicatory manner. Most recently, the Kentucky Supreme Court has explicitly held such in the case of *Hacker v. Baesler*, 812 S.W.2d 706 (Ky. 1991). At page 709-710 of its opinion, the Kentucky Supreme Court held:

> While the zoning classification which an individual property owner should enjoy is not a justiciable issue, an ordinance effecting an amendment to

> reclassify a particular property is nonetheless a culmination of a process essentially adjudicatory. K.R.S. 100.211 creates (or perhaps merely confirms) the right of a property owner to propose an amendment. Any amendment must be consistent with the comprehensive zoning plan, unless the plan is found to be inapplicable to the situation presented. The interests of an identifiable, individual property owner are weighed against the statutory criteria, and, often, against the interests of identifiable opponents of the amendment. The determination turns upon facts specific to one discreet property. Such fact finding, although hybrid, is inherently more adjudicative than legislative, and the result must be supported by substantial evidence.

Such reasoning directly characterizes the activities of the Boone County Planning Commission and Fiscal Court. Procedurally, the approval process for the concept development plan is identical to a zone change request. The same public hearing and procedural safeguards apply. The Commission acts as adjudicators on the basis of a record. As such, judicial immunity appropriately protects these Commissioners from the same vexations and fosters the same public interests as with the judiciary proper. In fact, recourse to the court under Kentucky law is by appeal from the record of the Planning Commission and not *de novo.* The Planning Commission functions as the trial level compiler of the fixed factual record upon which all subsequent procedural steps depend in an appellate process.

Petitioners misconstrue the holding of *Burns v. Reed,* 500 U.S. 478 (1991). *Burns* does not concern judicial immunity, but prosecutorial immunity. In *Burns,* the Supreme Court reaffirmed its earlier holdings that prose-

cutors are absolutely immune for activities related to the judicial process. However, such immunity does not attach to prosecutors involved in activities only remotely connected to the judicial process. In that case, the Supreme Court refused to extend absolute immunity to a prosecutor for giving advice to police since police officers had only qualified immunity for following the advice. In short, the giving of legal advice was not deemed intimately related to the judicial process. The same can hardly be said of those who are acting as judge in adjudicatory hearings. Absolute judicial immunity should apply to these persons. *Butz v. Economou,* 438 U.S. 478 (1978); *Bass v. Attardi,* 868 F.2d 45 (3rd Cir. 1989); *Horwitz v. State Board of Medical Examiners,* 822 F.2d 1508 (10th Cir. 1987); *Kutilek v. Gannon,* 766 F.Supp. 967 (D.Kan. 1991); *Jodeco, Inc. v. Hahn,* 674 F.Supp. 488 (D.N.J. 1987).

III.

WHETHER THE MEMBERS OF THE BOONE COUNTY PLANNING AND ZONING BOARD AND BOONE COUNTY FISCAL COURT IN DENYING THE ZONING CONCEPT DEVELOPMENT PLAN ARE ENTITLED TO QUALIFIED IMMUNITY AS A MATTER OF LAW.

Even if absolute immunity were not available to the individual Respondents herein, their dismissal would still be appropriate under qualified immunity. Since the trial court granted the individuals' motion to dismiss, no answer raising this defense or the statute of limitations appears in the record. However, both defenses bar the Petitioners' actions.

In the case of *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), the Supreme Court abandoned the subjective state of mind of the public official in favor of an objective test. The express purposes of the test were to protect

public officials from both the expense and the energy needed to defend vexatious lawsuits such as this one. The issue of immunity was given to the Court to be determined prior to discovery. The Court held:

> We conclude today that bare allegations of malice should not suffice to subject government officials either to the cost of trial or the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
>
> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed.

Id., at 818.

The Court has emphasized the importance of the qualified immunity test by holding that denials of qualified immunity are immediately appealable. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). As *Mitchell* makes clear, the Court's determination of whether the official's con-

duct violated clearly established "statutory or constitutional rights" should come prior to the conducting of discovery.

The individual Respondents in this case, at a minimum, enjoy a qualified immunity and therefore properly were dismissed from the lawsuit. Their conduct consists of conducting a due process public hearing regarding a concept development plan and enforcing existing Boone County zoning ordinances which provide for a "floating zone". Kentucky courts have seemingly approved the floating zone concept. *Bellemeade Company v. Priddle,* 503 S.W.2d 734 (Ky. 1974). Even if such zones should subsequently be held unconstitutional, qualified immunity shields these Respondents, since at the time these individual Respondents voted to reject Petitioners' concept development plan under such zoning regulations, their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *B Street Commons v. Board of County Comm'rs,* 835 F.Supp. 1266 (D.Colo. 1993). Without question, therefore, these Respondents are entitled to at least qualified immunity and were properly dismissed by the Boone Circuit Court.

CONCLUSION

The Petition for Certiorari should be denied. Petitioners fail to satisfy the initial threshold question of establishing a violation of a constitutional right such as is necessary to support their action based upon 42 U.S.C. §1983. Petitioners had no legitimate claim of entitlement or justifiable expectation to the approval of their concept development plan. Lacking such, the question of immunities, whether absolute or qualified, does not arise. If the Court reaches the immunities question,

clearly these Commissioners function in a quasi-judicial function under Kentucky state law and are thus entitled to absolute judicial immunity under *Butz v. Economou*, 438 U.S. 478 (1978). At a minimum, these Commissioners are entitled to qualified immunity for Petitioners' failure to articulate a violation of their constitutional rights which were clearly established at the time of the action.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF KENTUCKY
94-SC-769-D & 94-SC-778-D
(92-CA-3110-MR & 93-CA-262-MR)

ENTERPRISE VI, A KENTUCKY GENERAL PARTNERSHIP, ET AL. *MOVANTS*

vs. Boone Circuit Court
No. 90-CI-174

BOONE COUNTY FISCAL COURT, ET AL.
RESPONDENTS

AND

ERPENBECK COMMERCIAL ENTERPRISES, INC. *MOVANT*

vs. Boone Circuit Court
No. 90-CI-175

BOONE COUNTY FISCAL COURT, ET AL.
RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motions for review of the decision of the Court of Appeals are denied.

ENTERED December 14, 1994.

/s/ Robert F. Stephens
Chief Justice

APPENDIX B

BOONE COUNTY ZONING ORDINANCES

ARTICLE 15
PLANNED DEVELOPMENT (PD)

Section 1500

Intent

The intent of this article is to provide a permissive and alternative zoning procedure for innovative, mixed use residential, commercial, industrial or other type developments or physical design proposals capable of proving substantial value to the community over the conventional districting and other regulations prescribed as normal course in this order but requiring unique consideration, disposition, control and approval. Planned Development (PD) is a special overlay zoning district, which allows some variety among land uses and densities in return for imaginative designs.

Since Planned Development is an overlay zone, there is always an underlying zone which serves as a reference point to determine principally permitted accessory and conditional uses under the standard zoning classifications. However, if certain uses, which are not normally permitted in the underlying zone, are compatible, the Planned Development zone may be flexible to allow these uses. Also, the physical boundaries of the underlying zones within a Planned Development are intended to be flexible and not restrictive.

The intensity of use in a Planned Development zone may exceed by no more than fifty (50) percent the maximum intensity permitted in the underlying zoning district. If building intensity increased in Planned Development,

then the amount of open space (e.g., existing vegetation, buffer areas and new landscape) should increase proportionately.

A planned development may vary the height, use, organization, design, intensity, size or other features of the proposed development. In the case that a specific corridor study has been adopted for an area, intensity and open space recommendations of that study shall apply to specific development sites within the study area.

The planned development zone is intended to encourage:

- A maximum choice of living environments by allowing a variety of housing and building types and permitting a reduction in lot dimensions, yards, building setbacks, and area requirements;
- A more useful pattern of open space and recreation areas and, if permitted as part of the project, more convenience in the location of accessory commercial uses and services;
- A development pattern which preserves and utilizes natural topography and geologic features, scenic vistas, trees and other vegetation, and prevents the disruption of natural drainage patterns.
- A more efficient use of land than is generally achieved through conventional development resulting in substantial savings through shorter utilities and streets;
- A development pattern in harmony with land use density, transportation facilities, community facilities, and objectives of the comprehensive plan;
- A signage package in harmony with the objectives of the Planned Development.

Section 1501

Provisions Governing Planned Unit Developments

Because of the special characteristics of planned developments, special provisions governing the development of land for this purpose are required. Whenever there is a conflict or difference between the provisions of this article and those of other articles of this order, the provisions of this article shall prevail. Subjects not covered by this article shall be governed by the respective provisions found elsewhere in this order.

Section 1502

Application and Procedure

Upon approval by the Planning Commission and the legislative body or Fiscal Court, a planned development district may be applied to any other existing district in this order. Upon approval of a concept development plan, the Official Zoning Map shall be annotated for the land area involved so that the district name includes the notation, "PD." Planned development districts shall be approved by the Planning Commission and the legislative body or Fiscal Court in the manner provided in this Article.

For development plans on sites within the Houston-Donaldson Study Area, the recommended Implementation procedure in that study shall be followed. This may result in a development not following the normal Planned Development process if those development plans are consistent with the recommendations of the 'Houston-Donaldson Study'. This shall be determined through a Technical Committee recommendation to the full Planning Commission at the next regular Business Meeting. Decision as to the review process to be followed shall be by simple majority vote.

Section 1503

Pre-Application Meeting

The developer shall meet with an appropriate staff person of the Planning Commission prior to the submission of a concept development plan. The purpose of the meeting will be to discuss early and informally the purpose and effect of this order and the criteria and standards which may apply, and to familiarize the developer with the detailed objectives of the comprehensive plan and its elements, this order and this article.

For development plans within the Houston-Donaldson Study Area, a pre-application meeting of the applicant with the Technical Committee of the Planning Commission shall also be held. The purpose of this meeting is to arrive at a recommendation to the full Planning Commission as to whether or not the developer's plans are consistent with the recommendations of the 'Houston-Donaldson Study'. The Technical Committee meeting may be held immediately prior to a Business Meeting, and recommendation of the committee may be verbal.

Section 1504

Submittal and Contents of Application for Approval of Concept Development Plan

The Planning Commission shall require that a Concept Development Plan be submitted for property located in a Planned Development zone. The Concept Development Plan may be filed to the Planning Commission by the owner(s), owner by contract (option) or lessee of property for which the planned development is proposed. The Concept Development Plan shall include the following minimum requirements. The list of other requirements are *optional only.* With certain type of develop-

ments, it may be beneficial to submit a Concept Development Plan that is more detailed or provides more information to the Planning Commission. The list of other requirements are highly recommended for these types of developments and to provide further support for approval of a Concept Development Plan by the Planning Commission. In the case that a specific corridor study is in effect for a site, the optional requirements of a Concept Development Plan are especially important. Any special areas of concern in such a study must also be addressed by the Concept Development Plan. For sites within the Houston-Donaldson Study Area, Design Review and Signage information is required as part of the developer's plan information.

Minimum Requirements

1. *General Site Characteristics* – ownership, geography, soils, drainage, vegetation and other physical characteristics.
2. *Transportation Patterns* – public and private roads and internal and external circulation patterns.
3. *Land Use Characteristics* – existing and proposed land uses, structures and buildings (general description of size, area and height).
4. *Utilities and Infrastructure*
5. *Relationship of Proposed Zone Change or Submitted Concept Development Plan with Comprehensive Plan* – how specifically the proposed zone change or Submitted Concept Development Plan would conflict, conform, complement or otherwise affect the Comprehensive Plan.

OPTIONAL REQUIREMENTS OF CONCEPT DEVELOPMENT PLAN

1. Include Items 1-5 in the previously mentioned list of minimum requirements.
2. An area map showing adjacent property owners and existing land uses within 200 feet of the parcel.
3. If the site has unusual or unique natural features, demonstrate how proposed development preserves and utilizes natural topography and geologic features, scenic vistas, trees and other vegetation, and prevents the disruption of natural drainage patterns. If necessary, geotechnical studies should be submitted to indicate soil types, depth of bedrock and slope stability.
4. The location, description and size (acreage) of land uses.
5. Approximate location and number of residential units (if any) along with approximate square footage, density and height.
6. Approximate location and size (square footage) of non-residential buildings.
7. The location of public and private roads, rights-of-way, easements and parking.
8. Calculation of amount of open space both before and after construction. Indicate areas of expected open space and new landscaping. Include maintenance plans for these areas.
9. Where portions of the site are subject to flooding, the Concept Development Plan shall indicate extent and frequency.

10. General location of water, sanitary sewer, telephone, electrical and storm water lines. Capacity levels are recommended.
11. General description of the availability of community facilities such as schools, fire protection services and other types of facilities if any, and how these facilities are affected by this proposal.
12. Preliminary assessment of excavation and fill requirements along with storm water retention and detention plans.
13. Indicate the staging or construction schedule of the project.
14. Submit a detailed traffic study if the proposed development is large-scaled or if the project would significantly alter existing traffic patterns or volume.
15. Submit a sketch or drawing of the proposed buildings to demonstrate the visual appearance or a type of architecture. The Planning Commission and legislative body or Fiscal Court may recommend or approve the proposed district subject to any conditions or qualifications found merited in the Concept Development Plan or other conditions on the site. The Commission's approval in principle of the Concept Development Plan shall constitute a commitment to the planned land use types and intensities. Approval in principle shall not be construed to endorse a precise location or mixture of uses, configuration of parcels, arrangement of physical design, engineering feasibility or other particulars. The Planning Commission may seek assistance in making its recommendation from any appropriate source.

Section 1505

Public Hearing by Planning Commission

Upon receipt of an application for approval of a concept development plan, the Planning Commission shall hold at least one public hearing, within thirty (30) days of receipt of the application, after notice as required for amendment under Kentucky Revised Statutes, Chapter 424. The following notice, in addition to any other notice required by statute or local regulation or order, shall be given:

1. Notice of the hearing shall be posted conspicuously on the property for which the planned development is proposed at least fourteen (14) days in advance of the hearing; and

2. Notice of the hearing shall be given at least fourteen (14) days in advance of the hearing by registered mail or by certified mail, return receipt requested, to owners of all property adjoining the property for which the planned development is proposed. It shall be the duty of the person or persons proposing the amendment to furnish the names and addresses of the owners of all adjoining property. Records maintained by the Property Valuation Administrator may be relied upon conclusively to determine the identity and address of property owners.

3. Notice of the hearing shall be published in a newspaper of general circulation at least once, but may be published two (2) or more times, provided that one (1) publication occurs not less than seven (7) days prior to the hearing. Said published notice shall state, at a minimum, the time, place and purpose of the hearing.

Section 1506

Approval in Principle by Planning Commission

Within thirty (30) days after the public hearing required by Section 1505, the Planning Commission shall review the concept development plan to determine if it is consistent with the intent and purpose of this order; whether the proposed development advances the general welfare of the community and neighborhood, and whether the benefits, combination of various land uses, innovation of physical design, and the inter-relationship with the land uses in the surrounding area justify the deviation from standard district regulations. The Commission's approval in principle of the Concept Development Plan shall be necessary before a Preliminary Development Plan may be approved. Approval in principle shall constitute a commitment to the planned land use types and intensities. Approval in principle shall not be construed to endorse a precise location or mixture of uses, configuration of parcels, arrangement of physical design, engineering feasibility of other particulars. The Planning Commission may seek assistance in making its recommendation from any appropriate source.

Section 1507

Action by Legislative Body or Fiscal Court

After approval of the Concept Development Plan by the Planning Commission, all papers constituting the record and recommendations of the Planning Commission shall be transmitted to the Legislative Body or Fiscal Court. Within ninety (90) days after receipt of said materials, the Legislative Body or Fiscal Court shall, by ordinance or order, approve or disapprove the Concept Development Plan Application. Approval of the Concept Devel-

opment Plan Application shall constitute an amendment to the Zoning Map and the subject parcel shall be labeled with the designation (PD) after the underlying zone designation. A Certificate of Land Use Restriction shall be filed within 30 days of final action as explained in Section 290. If disapproved, the Legislative Body or Fiscal Court shall state the reasons for disapproval.

Section 1508

Preliminary Development Plan

After approval of the Concept Development Plan by the Legislative Body or Fiscal Court, or determination by the Planning Commission that the developer's plans are consistent with a specific study that impacts the development site, the developer shall submit a preliminary development plan to the Planning Commission. The preliminary development plan may cover the entire site shown in the concept development plan or a section of said site. The preliminary development plan shall be in general conformance with the concept development plan approved in principle. Five (5) copies of the preliminary development plan shall be submitted and must be endorsed by a Professional Engineer, Architect, or Landscape Architect registered in the Commonwealth of Kentucky.

Section 1509

Contents of Application for Approval of Preliminary Development Plan

An application for approval of the preliminary development plan shall be filed with the Chairperson of the Planning Commission by at least one (1) owner, owner by contract (option), or lessee of property for which the

planned development is proposed. Each application shall be signed by the owner or lessee, attesting to the truth and exactness of all information supplied on the application for preliminary development plan. Each application shall clearly state that the approval shall expire and may be revoked if construction on the project has not begun within three (3) years from the date of issuance of the approval. The application shall contain the following information:

1. A survey of the proposed development site, showing the dimensions and bearings of the property lines, structures and improvements, area in acres, topography, and other existing features of the development site bearing on the plan including major wooded areas, structures, streets, easements, utility lines, land uses, and the like;
2. All the information required on the Concept Development Plan: the location and sizes of lots, location and proposed density of dwelling units, non-residential building intensity, and land use considered suitable for adjacent properties;
3. A schedule for the development of units to be constructed in progression and a description of the design principles for buildings and streetscapes; tabulation of the number of housing units proposed by type; estimated residential population by type of housing; estimated non-residential population; and standards for height, open space, building density, parking areas, population density and public improvements proposed for each section of the development whenever the applicant proposes an exception from standard zoning districts or other orders governing development;
4. Engineering studies and plans showing, as necessary, water, sewer, drainage, electricity, telephone, and nat-

ural gas installations; waste disposal facilities; street improvements, and nature and extent of earthwork required for site preparation and development;

5. A site plan, showing multi-family or nonresidential building(s) or single family residential lots, various functional use areas, circulation, and their relationship;

6. Conceptual or typical landscaping facade, paving, street furniture and other plans and designs;

7. A description of deed restrictions, protective covenants, and other legal statements or devices to be used to control the use, development and maintenance of the land, and the improvements thereon, including those areas which are to be commonly owned and maintained.

The approval of the preliminary development plan shall constitute and substitute for the approval of a preliminary subdivision plat as required by the Boone County Subdivision Regulations. The engineering and other information required for the preliminary development plan shall generally be submitted at the same level of accuracy and detail as is required in the Preliminary Subdivision Plat.

Improvement plans and final plats shall be submitted in accordance with the standards and procedures required in the Boone County Subdivision Regulations, or, where no subdivision of land is required in accordance with Article 14, Site Plan Review, of this order.

Section 1510

Decision by Planning Commission

Within sixty (60) days after receipt of the preliminary development plan, the Planning Commission shall approve as presented, approve with supplementary conditions, or disapprove the preliminary development plan, stating the reasons for its actions in writing.

Section 1511

Expiration and Extension of Approval Period

The approval of a Preliminary Development Plan for a planned development district shall be for a period not to exceed two (2) years to allow for preparation and recording of the required subdivision plat the development of the project. If no construction has begun within three (3) years after approval is granted, the approved preliminary development plan may be voided and the land may revert to the district regulations in which it is located when the process for Amendment in Article 3 is followed.

No zoning amendment passed during the time period granted for the approved preliminary development plan shall in any way affect the terms under which approval of the planned unit development was granted. A one (1) year extension of an approved Preliminary Development Plan may be granted upon request to the Planning Commission.

Section 1514

Permitted Uses

Any uses found to be compatible and of value to the community under the proposal may be combined in

planned development districts provided that the proposed location of the uses will not adversely affect adjacent property, and/or the public health, safety, and general welfare and/or the specific objectives of the comprehensive plan.

It is also provided that the amount of land devoted to each use in a planned development shall be specifically determined by the Planning Commission.

Section 1515

Intensity

The intensity of use in a planned development may exceed by no more than fifty (50) percent the maximum intensity permitted in the underlying zone district.

Section 1516

Minimum Size

The minimum size or area required for a planned development overlay shall be no less than five (5) acres.

Section 1517

Minimum Standards

A planned development and its permitted, accessory and conditional uses, buildings or structures shall be subject to the supplemental, parking and loading, signage regulations of this order, unless superceded by any special requirements, conditions, variances or other particulars imposed by the Planning Commission during the concept or preliminary application and hearing phases described in this article. Such special conditions may include provisions governing project ownership, common open space, lands or facilities, disposition of open land, infrastructure

provisions including any physical design and/or any other requirement found to be necessary, appropriate or desirable for the purposes of this district.

Such conditions shall be made a part of the terms under which the development is approved. Any violation of such conditions shall be deemed a violation of this order.

Section 1518

Amendments to Concept Development Plan and Preliminary Development Plan

Amendments to the Concept Development Plan involving changes in the development concept, uses, intensity or other elements must be submitted to the Planning Commission and shall conform to the procedure described in Sections 1505-1507. Changes to the Preliminary Development Plan must be submitted to the Director for his approval. The Director shall make a determination that the proposed change does not affect the overall development concept in terms of use, intensity and design, before approving a change. A denial of a proposed change to the preliminary development plan by the Director may be appealed by the applicant to the Planning Commission. The Director may refer any proposed change to the preliminary development plan to the Planning Commission for their decision.